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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960
No. 278

GEORGE COOPER, ABE S. TOBEROFF, EDWIN D. RICH, ALBERT G. JEFFRIES, FLOYD L. CLEMENS, and RALPH LEVERSON,

Appellants,

vs.

PETER J. PITCHESS, Sheriff of the County of Los Angeles, State of California, and PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

On Appeal From the Supreme Court of the State of California.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEALS.

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Statement.

Respondents' motion to dismiss the appeals herein is founded upon two conclusions: the first, that the appeals "do not present a substantial federal question"; the second, that the decision of the court below "rests on an adequate non-federal basis" [M1-2].[1]

[1] The reference "M" is to respondents' "motion to dismiss appeals."

1. As to the contention that the judgment rests on an adequate non-federal basis, the respondents' motion contains no proof in support of such assertion, and the contention is clearly without merit.

The respondents do not deny that the federal questions were seasonably presented and that the federal questions were constantly raised throughout the state court proceedings [J2-3, 12-21].[2] Since the federal questions were presented in the petitions for writs of habeas corpus [J12-14], in the joint traverse to the sheriff's return [J16], in the petition for rehearing and in the notice of appeal to this Court [J20-21], and since the opinion of the court below [J Appendix "A"] assumes that the federal questions are properly before the court and considers and disposes of them, it is plain, it is respectfully submitted, that the federal questions were timely and properly raised.

Moreover, since there was timely and proper challenge on federal grounds to the validity of the state statute, the decision and judgment of the court below sustaining the statute necessarily rejected the federal claims. (See, *Largent v. Texas*, 318 U. S. 418; *Chicago, Burlington and Quincy Ry. Co. v. Illinois ex rel. Drainage Commissioners*, 200 U. S. 561, 580-581; *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 67; *Home Insurance Co. v. Dick*, 281 U. S. 397, 407.)

What respondents seem to be asserting is that the court below was correct in holding that the state statute as construed, in its face and as applied to these appellants, is not repugnant to the Constitution and laws of the United States [M2-13]. Such an argument is not

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[2]The reference "J" is to appellants' Jurisdictional Statement.

addressed to the jurisdiction of this Court to review the appeals, but is an ultimate argument on the merits. (28 U. S. C. 1257(2).)

2. As to the contention that the appeals herein do not present a substantial federal question, respondents seem to have either overlooked or misconceived the federal questions presented, and the grounds upon which it is contended that the federal questions are substantial, as they appear in appellants' Jurisdictional Statement [J5-8, 22-56]. The operation and effect of the statute, for example, upon the exercise of freedoms of speech and press ordinarily protected from state abridgment by the provisions of the Fourteenth Amendment has been completely ignored by respondents. We discuss briefly below the points made by respondents in their motion, in the order there presented.

I [M2-4]

The sole question which respondents assume to be before the Court is whether the federal constitutional and statutory provisions governing extradition are exclusive. Such a contrived position clearly ignores the posture of these proceedings and the grounds of the challenge to the validity of the state statute continually made by appellants, which include at least claims of free speech and free press abridgments, arbitrary deprivation of liberty and property without due process of law, and denial of the equal protection of the laws, all contrary to the applicable provisions of the Fourteenth Amendment. See the Questions Presented in the Jurisdictional Statement [J5-8].

It does not meet the issues, it is respectfully submitted, to quote some general language from the decision of the court below or from a California legal com-

pendium [M2-3] which does not purport to discuss the particular federal questions here presented.

Nor is the relevance of *Seward v. Heinze*, 262 F. 2d 42 (C. A. 9, 1958), cited by respondents [M4] readily apparent. Since the problem in *Seward v. Heinze, supra*, did not involve any question of extradition, and the only issue was a question of "waiver," with no federal questions presented relative to the validity of any state statute, the significance of the decision in relation to the issues here is not discernable, it is respectfully submitted.

II [M4-5]

The respondents assert that the question presented by the appellants [J5] relative to the abridgment of free speech and press by the state statute, on its face and as construed and applied, is no more "in essence" [M4] than a contention that "the Federal Extradition Statute (18 U. S. C., Sec. 3182) is exclusive" [M4].

Such an assertion simply ignores the content of the question presented, and avoids completely any answer to the arguments made in the Jurisdictional Statement [J22-38] demonstrating that the federal question presented is substantial, and one of first import in this Court.

Since respondents have chosen to ignore the discussion of both the law and facts dealing with the constitutional invalidity of the statute as applied to publishers and national distributors of literature and other media of communication [J22-38], the appellants do not repeat their arguments here. Clearly the question presented is so substantial as to require plenary consideration by this Court, all the more so since respondents have chosen not to dispute this contention.

III [M5-9]

Here again respondents ignore the federal questions presented by appellants. Respondents assert that the "indictments are sufficient on their face," and "as supplying the requirements for extradition under 1549.1 California Penal Code, the affidavits themselves are sufficient" [M9], and therefore, it is urged, the court below was justified in concluding that the statutory requirements had been met [M8-9].

However, the issue here is not the construction of the statute, but the constitutionality of the statute as construed [J5-6, 39-42]. The respondents do not deny that there must be a charge and proof that a person has committed "an act in this State . . . . intentionally resulting in a crime" in the other State before a person may be forcibly transported thousands of miles away from his family residence and business [J39].

The indictment made no such charge, and as the court below conceded [J Appendix A, p. 6], the affidavits "do not set forth the affiant's sources of information or reasons for belief that petitioners had committed the offenses charged. . . ." Respondents, in quoting from the said affidavits [M7] appear to overlook that the averments were made on information and belief without statement of the sources of information or the grounds for belief.

Under both federal and state decisional law, charges made as aforesaid appear to be no charges at all [J40-42], and thus the federal question is presented whether the state statute, so construed and applied, permitting the extradition of appellants without lawful charge, arbitrarily deprives appellants of their liberty and property without due process of law and denies them the equal

protection of the laws contrary to the provisions of the Fourteenth Amendment. This substantial federal question, and the discussion thereunder in the Jurisdictional Statement [J39-42], are simply not answered by respondents in their motion here.

IV [M10]

The respondents do not deny that the constitutional validity of Section 6 of the Uniform Criminal Extradition has never been passed upon by this Court, nor do they attempt to discuss the questions of due process, procedural and substantive, as well as conflict under the supremacy clause of the Constitution, raised by the broad construction of the statute by the court below to include publishers and national distributors of literature [J6-7, 47-54].

Respondents dismiss the matter by pointing to some lower court decisions unrelated to questions of speech and press [M10], and to the decision of this Court in *People of the State of New York v. O'Neill*, 359 U. S. 1, which appellants have endeavored to show involved neither the law, nor the facts, nor the questions here presented [J36-37].

V [M10-11]

Respondents gather a series of decisions in which it has been held that "fugitives from justice" may not ordinarily question in the asylum State the constitutionality of the statutes under which they have been indicted in the demanding State [M10-11].

The difficulty with respondents' position is that it does not deal with the federal question presented here, nor the discussion thereunder [J7, 42-46]. If the Pennsylvania statute under which appellants were indi-

cated in 1958 was void on its face during the charged years—and respondents do not discuss this issue [J43-45]—then clearly the appellants committed no act in California intentionally resulting in the commission of "a crime" in Pennsylvania, and extradition under such circumstances would be an arbitrary deprivation of liberty and property without due process of law [J45-46].

Appellants were not charged with being fugitives from justice; they were charged with committing acts in California where they resided intentionally resulting in a crime in another State. If this charge was without support in any essential element, clearly the appellants were entitled as a matter of due process of law to have this issue decided before forcible transportation to a remote jurisdiction. At least such federal question, ignored by respondents, presents an issue of substance [J42-46].

VI [M12-13]

Respondents simply restate the position of the court below with respect to the concluding federal questions presented by appellants [J7-8]. No attempt is made to answer the discussion in the Jurisdictional Statement [J54-56], nor to deal with the particular facts and circumstances presented here on the issues of conflict and preemption which were not involved in *Alberts*. The constitutional questions raised by the amendment of 18 U. S. C., 1461 since *Alberts* making the knowing use of the mails for the mailing of obscene matters a continuous offense, and the effect of prior federal adjudications in favor of appellants Cohen and Toberoff holding the very matter involved in the Pennsylvania indictments to be constitutionally protected material [J55-56], is not discussed by respondents in their motion here.

VII [M13-14]

The motion made by the respondent Pitchess to dismiss the appeals upon the ground that he is not a "proper party" to the proceedings appears to be without merit, it is respectfully submitted. The grant of the writs and bail by District Judge Mathes was made prior to the filing of the petitions for hearing with the California Supreme Court, in order to prevent the extradition of appellants before the State Supreme Court could consider their cases, and the Supreme Court was advised of these facts in the petitions for hearing which it subsequently granted. In California, habeas corpus is the only way to review the legality of extradition procedures (Penal Code 1550.1), and, as indicated by the California Supreme Court in these very proceedings [J15], the California courts construe the law as not requiring a person ordered extradited to go to jail in order to obtain review by a court. (Compare, *Shaughnessy v. Podreiro*, 349 U. S. 48, 51.) Such construction will of course be accepted by this Court under well established principles, and the respondents are therefore proper parties on these appeals from the final judgment of the State Court. (See, *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 70-71.)

Conclusion.

The Jurisdictional Statement presents substantial constitutional questions of public importance which should be decided by this Court. This Court plainly has juris-

diction to review. Respondents' motion to dismiss is untenable. Further argument properly awaits hearing on the merits.

Respectfully submitted,

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